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No. 31

In the Supreme Court of the United States

OCTOBER TERM, 1931

J. H. GWINN, BENEFICIARY OF THE ESTATE OF M. A. GWINN, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 841

J. H. GWINN, BENEFICIARY OF THE ESTATE OF M. A. Gwinn, petitioner

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 13–18) is reported in 20 B. T. A. 1052. The opinion of the Circuit Court of Appeals (R. 32) is reported in 54 F. (2d) 728.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 5, 1932. (R. 40.) A petition for rehearing was denied on February 23, 1932.

(R. 41.) The petition for a writ of certiorari was filed March 29, 1932. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in computing the Federal estate tax of a decedent who died October 5, 1924 (which tax was consequently governed by Section 302 of the Revenue Act of 1924), the Commissioner was justified in including in the gross estate one-half of the value of certain property held by the decedent and the petitioner as joint tenants under a joint tenancy created in June, 1915.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 13–16.

STATEMENT

The Board of Tax Appeals found the facts as stipulated by the parties. (R. 11–13.) They may be summarized as follows:

The petitioner is the beneficiary of the estate of M. A. Gwinn, and is in actual or constructive possession of the property of the decedent, who died October 5, 1924. (R. 11.)

In June, 1915, the decedent and the petitioner, while residing in California, acquired certain property as joint tenants, with the right of survivorship

and not as tenants in common, and the decedent and the petitioner contributed equal amounts of property to the estate in joint tenancy so created by them. (R. 12.)

In computing the value of the gross estate of the decedent, the respondent determined the value of all of the property held as joint tenants by the decedent and the petitioner and then included in the gross estate of the decedent half of the value of the property so held. (R. 11.) No effort was made to include anything other than the decedent's half of the total estate held in joint tenancy. (R. 11–12.)

It is agreed between the parties that if the Commissioner was not justified in including half of the value of the property so held as joint tenants, there has been an overpayment of estate tax in the amount of $2,172.16, and that if half of the value of the property held as joint tenants is properly subject to the estate tax, there is a deficiency in the amount of $719.61.

Upon these facts the Board of Tax Appeals held that half of the value of the property held in joint tenancy by the decedent and the petitioner must be included in the decedent's gross estate for Federal estate tax purposes, and entered its order that there is a deficiency in Federal estate tax in the sum of $719.61. The Circuit Court of Appeals for the Ninth Circuit affirmed the decision of the Board of Tax Appeals.

ARGUMENT

I

DURING THE LIFETIME OF THE DECEDENT IT WAS WITHIN HER POWER TO SEVER THE JOINT TENANCY AND THUS TO DESTROY THE RIGHT OF SURVIVORSHIP; THE TERMINATION OF THIS POWER ON THE DECEDENT'S DEATH IS A PROPER SUBJECT OF THE ESTATE TAX

Section 302 of the Revenue Act of 1924 (*infra*, pp. 13–14), which was in effect at the time of the decedent's death, provides that the value of the gross estate of a decedent shall include—

> the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, * * * except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: * * *.

By Section 302 (h) it is provided that this provision shall apply to all joint tenancies whether they are created "before or after the enactment of this Act." The sole question involved in this case is whether this clearly expressed intention of Congress violates the due process clause of the Fifth Amendment.

The property in question was held by the decedent and the petitioner as joint tenants, under a tenancy which was created in 1915. (R. 12.) Although survivorship is a necessary element of a joint estate, it is familiar law that a joint tenancy may be severed in any one of several ways. A severance terminates the joint estate and with the termination the right of survivorship ceases. This is established by the decisions of the California courts and by California statutes as well as at common law.

Thus, "a joint tenancy may be severed and ended by a conveyance by one of the tenants of his share" (*Green* v. *Skinner,* 185 Cal. 435, 438); a joint tenant may bring an action for a partition of his interest (Sec. 752, Cal. Code of Civil Procedure); an involuntary alienation of the interest of one tenant severs the tenancy and destroys the right of survivorship (*Hilborn* v. *Soale,* 44 Cal. App. 115).

It is thus plain that under the law of California one joint tenant has the power at any time during his life to sever the joint tenancy and thus to destroy the right of survivorship. And it is likewise plain, under numerous decisions of this Court, that the cessation of this power, which was an event which occurred after enactment of the Revenue Act of 1924 was the proper occasion for the imposition of an estate tax.

In *Saltonstall* v. *Saltonstall,* 276 U. S. 260, this Court upheld the constitutionality of a Massachu-

setts statute taxing "the transfer of property passing to anyone on the exercise of a power of appointment *or the failure to exercise it.*" (276 U. S. 269.) This Court said (p. 271):

> And so the property passing to the beneficiaries here was acquired only because of default in the exercise of the power during the donor's life and thus was on his death subject to the state's power to tax as an inheritance.

A similar result was reached by this Court in *Chase National Bank* v. *United States,* 278 U. S. 327, 338, where it was said:

> Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, * * *. And the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death, *Bullen* v. *Wisconsin,* 240 U. S. 625; * * *.

This reasoning was adopted and applied in upholding the taxability of the two trusts involved in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

From these cases it is clear that the transfer of property which remains subject to the control of a person during his lifetime and passes to another at his death only because he has not exercised a

power which he might have exercised at any time during his life, may constitutionally be made subject to the estate tax in effect at the time of that person's death, regardless of when the estate was originally created. In the present case, it is true that the joint tenancy was created in 1915. But from the time of its creation until the time of the death of the decedent in 1924 the half of the property which it is now sought to tax was entirely in the decedent's control, and he might at any time have transferred it, or otherwise have severed the joint tenancy, thus terminating the right of survivorship without which the present petitioner would not have acquired the interest. The existence of this power in the decedent made the transfer to the petitioner incomplete until the decedent's death with respect to the half of the property now in question. That the termination at the decedent's death of the right to exercise this power is the proper subject of the estate tax is clearly established by the decisions of this Court.

II

THE DECEDENT'S DEATH BROUGHT ABOUT THE SHIFTING OF THE ECONOMIC BENEFITS OF PROPERTY, AND THIS EVENT HAVING TAKEN PLACE AFTER THE ENACTMENT OF THE TAXING STATUTE IS PROPERLY THE SUBJECT OF THE ESTATE TAX

The decedent's death in the present case occurred in 1924, after the enactment of the Revenue Act of 1924. Death was the "generating source" of

enlarged property rights in the petitioner and we submit that it was thus proper to include the property in the decedent's estate for this reason, as well as for the reason advanced in Point I of this brief, namely that until the death of the decedent it remained wholly within her power to determine whether the petitioner would or would not acquire the interests to which he has in fact succeeded.

In *Tyler* v. *United States,* 281 U. S. 497, this Court upheld the constitutionality of an estate tax laid on property held by the decedent as a tenant by the entirety. In that case the tenancy was created after the passage of the applicable taxing statute, so that the actual decision is not necessarily controlling here. But we submit that the grounds on which the decision in the *Tyler* case is based make it clear that the application of the taxing statute to a joint tenancy created before September 8, 1916, is not a retroactive application and that it is valid under the Constitution.

In the present case the decedent's death was the event which made the shifting of the full benefits of ownership to the petitioner complete and effective, and secured to him the sole possession and enjoyment of the property unburdened by the decedent's rights. Until his death, the decedent retained a dominion over the property equal in all respects to that of the petitioner. Under the decision in the *Tyler* case, this ripening of property

rights is a proper subject for the imposition of a tax. See also *Klein* v. *United States*, 283 U. S. 231. There is nothing in the present case to bring it within the rules in *Nichols* v. *Coolidge*, 274 U. S. 531, in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, with respect to the "five trusts," or in *Coolidge* v. *Long*, 282 U. S. 582. The result of the death of the decedent in the instant case was not simply the coming into possession by the petitioner of an estate which he already owned irrevocably. Until the death of the decedent the petitioner had no interest whatever in the decedent's share of the property held in joint tenancy, except the possibility of survivorship, which it was within the decedent's power at any time to terminate. Thus, it is clear that death in the present case was not merely the occasion for the coming into possession of an already vested remainder, but was the "generating source" of new rights, and was consequently the proper subject of an estate tax regardless of the time when the tenancy was created.

In *Knox* v. *McElligott*, 258 U. S. 546, it appeared that the decedent and another became joint tenants of certain property in 1912. The decedent died in 1917, and his executors included in the return of the Federal estate tax on his estate the value of one-half of the jointly owned property. Thereafter the Commissioner of Internal Revenue added to the estate the one-half of the value which had not

been included in the original return. This Court held that only the one-half of the value of the property which had been included in the original estate-tax return could be made subject to the estate tax.

It is plain that there is nothing in *Knox* v. *McElligott* which is inconsistent with the respondent's position in the instant case. For in that case one-half of the jointly owned property was taxed, and there is no effort in the present case to tax more than one-half of the value of the property held jointly by the decedent and the petitioner. (R. 11–12.) Furthermore, *Knox* v. *McElligott* involved only a question of construction, which is not present in the instant case, for Section 302 (h) of the Revenue Act of 1924 (*infra,* p. 14) expressly provided that Section 302 (e) relating to joint tenancies, shall apply to tenancies whether made or created "before or after the enactment of this Act."

For similar reasons the decision below is not in conflict with *Carter* v. *English,* 15 F. (2d) 6 (C. C. A. 9th), and *Lynch* v. *Congdon,* 1 F. (2d) 133 (C. C. A. 8th). In each of those cases the statute involved was the Revenue Act of 1916, which contained no express provision making it apply to joint tenancies created before its passage. *Doe* v. *Commissioner,* 18 B. T. A. 427, and *Mastick* v. *Commissioner,* 18 B. T. A. 428, arose under the Revenue Act of 1918, which contained no provision corre-

sponding to Section 302 (h) of the Revenue Act of 1924. The petitioner relies on *Estate of Gurnsey,* 177 Cal. 211, as establishing the law of California that the survivor takes nothing upon the death of his co-tenant. But this same argument, based upon the theoretical conceptions of State law, was advanced by the taxpayer in *Tyler* v. *United States.* 281 U. S. 497, *supra,* and was rejected by this Court. In its opinion this Court said (p. 503):

> This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law.

The question here involved has been considered by several State courts, which have held that on the death of a joint tenant a State inheritance tax statute might constitutionally be applied to tax half the value of property held in joint tenancy, even though the estate was created before the passage of the taxing Act. *Matter of McKelway,* 221 N. Y. 15; *Tax Commission* v. *Hutchison,* 120 Ohio St. 361; *Will of Ray,* 188 Wis. 180.

CONCLUSION

The decision of the Circuit Court of Appeals is correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL, 1932.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

STATUTE

The Revenue Act of 1924 (Act of June 2, 1924, c. 234, 43 Stat. 253, 304) in Title III (Estate Tax) provided in part:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is propor-

tionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1094.)

REGULATIONS

Regulations 68, promulgated March 26, 1925, under the Revenue Act of 1924, provided in part:

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships, wherein the right of survivorship exists, and specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contrib-

uted towards the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

Treasury Decision 4248 (VII–2 Cumulative Bulletin 358–359), promulgated November 23, 1928, provides:

> TREASURY DEPARTMENT,
> OFFICE OF COMMISSIONER,
> OF INTERNAL REVENUE,
> *Washington, D. C.*
>
> *To Collectors of Internal Revenue and Others Concerned:*
>
> Article 22 of Regulations 68 and 70 is hereby amended by adding thereto the following sentence:
>
> The statute applies only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916.
>
> D. H. BLAIR,
> *Commissioner of Internal Revenue.*
>
> Approved November 23, 1928.
>
> A. W. MELLON,
> *Secretary of the Treasury.*

Treasury Decision 4294 (IX–2 Cumulative Bulletin 425), promulgated July 3, 1930, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

The last sentence of article 22 of Regulations 68, added thereto by Treasury Decision 4248, is amended to read as follows:

The statute extends to joint ownerships wherein the right of survivorship exists, regardless of when such joint ownerships were created.

ROBT. H. LUCAS,
Commissioner of Internal Revenue.

Approved July 3, 1930.

A. W. MELLON,
Secretary of the Treasury.

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